In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 918

W. ABORN SPINNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a dentist, was charged in a two-count indictment with income-tax evasion for 1958 and 1959, in violation of Section 7201 of the Internal Revenue Code of 1954 (R. 4–5). The government's proof showed that petitioner and his wife had taxable income of $17,167.39 in 1958 and $9,384.43 in 1959, as compared with reported taxable income for the respective years of $1,443.82 and $1,412.54 (R. 250–253).

Petitioner was convicted on each count after a jury trial. He was sentenced to two concurrent prison terms of two months and was fined a total of $5,000 (R. 345).

286-846—68

There is no merit to the sole contention made in the petition—that the trial court erred in denying a motion, based on *Miranda* v. *Arizona*, 384 U.S. 436, to suppress certain statements made by petitioner in the course of a formal interview in the Boston office of the Internal Revenue Service in April 1964.

To begin with, petitioner was advised of his right to counsel and his privilege against self-incrimination. The letter inviting him to appear for the interview informed him that a criminal prosecution was being considered, and stated that he could appear with counsel if he so desired (Pet. 9; R. 332). At the very beginning of the interview the following exchange took place (Pet. 15):

> 1. Mr. REALE. Doctor Spinney, you recently received a letter inviting you to come here today, if you so chose, for a Formal Interview. Is that right?
>
> Dr. SPINNEY. Yes.
>
> 2. Q. Doctor Spinney, the purpose of this interview, if there is to be one, is to afford you the opportunity to offer any explanation, or submit any evidence you might choose to submit. You should understand if you do make any statements, or submit any evidence, these statements must be made under oath, and you should be cognizant of your constitutional guarantee against self-incrimination. Is that perfectly clear to you, Doctor?

A. I think so.

3. Q. Are you aware of your rights under the Fifth Amendment, that you cannot be compelled to testify against yourself?

A. No, but that doesn't interest me. I don't know why it should. Go ahead. If you should bring up a problem I will let you know. As far as I am concerned, I am ready to listen and see what happens.

Assuming, *arguendo*, that petitioner was not warned of his rights in the manner required by *Miranda*, it is clear that he was not in custody or deprived of his freedom in any way, and therefore was not subject to the kind of compulsion that the rules of *Miranda* were designed to prevent. The courts of appeals in five other circuits agree that the *Miranda* warning is not required in such a case. *Thomas* v. *United States*, 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[1] *United States* v. *Maius*, 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, October 16, 1967, No. 372, this Term; *United States* v. *Mansfield*, 381 F. 2d 961 (C.A. 7th), certiorari denied, December 18, 1967, No. 723, this Term; *Frohmann* v. *United States*, decided July 27, 1967, 20 A.F.T.R. 2d 5244 (C.A. 8), certiorari

[1] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States*, 377 F. 2d 535 (C.A. 5).

denied, December 4, 1967, No. 644, this Term; *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011.[2]

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

JANUARY 1968.

---

[2] *United States* v. *Schoenburg*, 19 A.F.T.R. 2d 348 (D. Ariz.); *United States* v. *Kingry*, 19 A.F.T.R. 2d 762 (N.D. Fla.), and *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D. Ill.), on which petitioner relies (Pet. 6–7), have been discredited by appellate decisions in their respective circuits. The weight of district court opinions agrees with the views expressed in the courts of appeals: See *United States* v. *Gleason*, 265 F. Supp. 880 (S.D. N.Y.); *United States* v. *Fiore*, 258 F. Supp. 435, 440 (W.D. Pa.); *United States* v. *Hill*, 260 F. Supp. 139 (S.D. Cal.); *United States* v. *Carlson*, 260 F. Supp. 423 (E.D. N.Y.); *Moon* v. *Brennan* (E.D. Wis.), decided November 21, 1966, 19 A.F.T.R. 2d 641; *Stern* v. *Robinson*, 262 F. Supp. 13 (W.D. Tenn.); *United States* v. *Bachman*, 267 F. Supp. 593 (W.D. Pa.); *United States* v. *Neves*, 269 F. Supp. 158 (S.D. N.Y.); *United States* v. *Basil*, 268 F. Supp. 1018 (S.D. Fla.); *United States* v. *Bohrod* (W.D. Wis.), decided December 14, 1965, 67-2 USTC, par. 9622.

U.S. GOVERNMENT PRINTING OFFICE: 1968